Supreme Court, U.S.
FILED
MAY 25 2005
OFFICE OF THE CLERK

No. 04-1609

In The

SUPREME COURT OF THE UNITED STATES

COUNTY OF SACRAMENTO and LOU BLANAS, Sheriff,
Petitioners,

vs.

OSCAR W. JONES,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under California's doctrine of equitable tolling, is a sexually violent predator entitled to avoid the statute of limitations applicable to his civil rights action (which challenges the terms of his civil detainment while awaiting a civil trial on his status as a sexually violent predator), when the record undisputedly shows that he did not suffer any inability (but enjoyed an enhanced capacity) to contact attorneys or avail himself of judicial processes?

LIST OF PARTIES

1) OSCAR W. JONES, Plaintiff and Respondent;

2) COUNTY OF SACRAMENTO, Defendant and Petitioner;

3) LOU BLANAS, Sheriff, Defendant and Petitioner.

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OPINIONS BELOW

The unpublished order of the U.S. Court of Appeals for the Ninth Circuit denying rehearing and rehearing en banc in this matter, filed on February 24, 2005, is reprinted in the Appendix filed herewith, p. 1a. The published opinion of the U.S. Court of Appeals for the Ninth Circuit, filed on December 27, 2004, is reported at Jones v. Blanas, 393 F.3d 918, and is reprinted in the Appendix filed herewith, pp. 2a-28a. The unpublished order of the U.S. District Court for the Eastern District of California, adopting the findings and recommendations of U.S. Magistrate Judge John F. Moulds, filed on September 27, 2002, is reprinted in the Appendix filed herewith, pp. 27a-28a. The unpublished findings and recommendations of U.S. Magistrate Judge John F. Moulds, filed on August 16, 2002, is reprinted in the Appendix filed herewith ("App."), pp. 29a-44a.

JURISDICTION

On December 27, 2004, the U.S. Court of Appeals filed its published opinion in this matter. 393 F.3d 918, App. at p. 2a. Subsequently, on February 24, 2005, the U.S. Court of Appeals for the Ninth Circuit filed an order denying Petitioners' Petition for Panel Rehearing and for Rehearing En Banc. App. at p. 1a. Thus, the jurisdiction of this Court to review the judgment of the U.S. Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AT ISSUE

The California Welfare and Institutions Code

In cases where an inmate's parole or temporary parole hold pursuant to Section 6601.3 will expire before a probable cause hearing is conduced pursuant to Section 6602, the agency bringing the petition may request an urgency review pursuant to this section. Upon that request, a judge of the superior court shall review the petition and determine whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. If the judge determines that the petition, on its face, supports a finding of probable cause, the judge shall order that the person be ***detained in a secure facility*** until a hearing can be completed pursuant to Section 6602.... CAL. WELF. & INST. CODE § 6601.5 (West 1998) (emphasis added).

A judge of the superior court shall review the petition and shall determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent, predatory criminal behavior upon his/her release. The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing. If the judge determines that there is not probable cause, he or she shall dismiss the petition and any person subject to parole shall report to parole. If the judge determines that there is probable cause, the judge shall order that the person ***remain in custody in a secure facility*** until a trial is completed and shall order that a trial be conducted to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his/her release from the jurisdiction from the ***Department of Corrections or other secure facility***. CAL. WELF. & INST. CODE § 6602 (West 1998) (emphasis added).

No person may be placed in a state hospital pursuant to the provisions of this article ***until there has been a determination*** pursuant to Section 6601.3 or 6602 that there is probable cause to believe ***that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior***. . . . CAL. WELF. & INST. CODE § 6602.5 (West 1998) (emphasis added).

A ***person subject to this article shall be entitled to*** a trial by jury, to ***the assistance of counsel***, to the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports. ***In the case of a person who is indigent, the court shall appoint counsel to assist him*** or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. CAL. WELF. & INST. CODE § 6603(a) (West 1998) (emphasis added).

STATEMENT OF THE CASE

The factual-background section of this statement of the case is quoted directly (with two alterations in italicized brackets) from the published opinion of the U.S. Court of Appeals for the Ninth Circuit in this matter, 393 F.3d at 923-25, App. at pp. 3a-8a.

A. Factual Background

In June 1997, Jones was incarcerated at the Susanville State Prison for a parole violation. On December 3, 1997, shortly before the conclusion of Jones's six-month sentence, he was transferred to the Sacramento County Jail to await a hearing on a petition for commitment as a sexually violent predator; the following day, the court ordered Jones detained at that facility under the *[*Sexually Violent Predator Act ("SVPA")*]*. Although the SVPA requires a probable cause hearing within 55 days, *see* CAL. WELF. & INST. CODE §§ 6601.3, 6601.5, it was not until September 16, 1998, that the state superior court found probable cause to continue to hold Jones for SVPA commitment proceedings. On December 13, 1999, at the conclusion of Jones's trial by jury, he was found to be a sexually violent predator. Jones was committed to Atascadero State Hospital on January 4, 2000.

In total, Jones was incarcerated at the Sacramento County Jail from December 3, 1997, to January 4, 2000, a period of over two years. For roughly the first year of his time at the County Jail -- from December 3, 1997, to December 9, 1998 -- Jones was housed with the general criminal population of the Jail. For Jones's remaining time at the Sacramento County Jail -- from December 9, 1998, to January 4, 2000 -- he was housed in an administrative segregation unit known as "T-Sep." According to the declaration of a sheriff's deputy, this is not a disciplinary housing unit. However, in T-Sep Jones was subject to far more restrictive conditions than those afforded to the general jail population. Jones's recreational activities were completely taken away, and he was allowed only one hour of exercise every other day. Phone calls and visiting privileges were considerably more limited in T-Sep.

The time Jones was allowed out of his cell was reduced more than tenfold. Jones was denied access to religious services. Jones's law library access was considerably curtailed: while in T-Sep, Jones was denied physical access to the law library; he could request, by citation only, copies of cases no more than twenty pages long.

Throughout his time at the Sacramento County Jail, Jones was subjected to numerous strip searches, some of which were conducted outdoors, and many of which were conducted at gunpoint in the middle of the night and accompanied by various intimidating tactics including poking with large weapons. On at least three occasions, Jones was led to the outside recreation area; forced at gunpoint to remove all clothing within the sight of many deputies (including female deputies); forced to lift his penis and testicles for inspection, run his fingers through his hair, then run his fingers inside his mouth; and forced to bend over, spread his buttocks apart with his hands, and cough three times.

On December 29, 2000, Jones brought this 42 U.S.C. § 1983 action against Sheriff Lou Blanas and the County of Sacramento for damages based on violations of his constitutional rights during the twenty-five-month period he was confined awaiting adjudication and eventually commitment under the SVPA.[1] On appeal, Jones claims that Blanas and the County violated his rights to free exercise of religion, access to the courts, freedom from unreasonable searches, and substantive due process as to conditions of confinement. Jones also claims that the district court abused its discretion in preventing adequate discovery.

On July 6, 2001, the magistrate judge ordered a four-month discovery period, with written discovery requests due sixty days before the end of the discovery period. Some of Jones's discovery requests were timely; some were filed several weeks after the deadline. On

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[1] Jones included several other officials as defendants; the magistrate judge refused service on these defendants because Jones had not stated a claim against them upon which relief could be granted. Jones does not challenge these dismissals here.

October 24, 2001, Jones moved the court for a thirty-day extension of discovery, because mail service had been discontinued at Atascadero due to the events of September 11, 2001, and because of disagreements with the defendants over discovery. Stating that Jones had failed to show good cause for an extension, the court denied the motion.

Blanas and the County soon thereafter moved for summary judgment. Jones responded first with a cross-motion for summary judgment, and then with a motion to stay defendant's summary judgment pursuant to Federal Rule of Civil Procedure 56(f). Jones also moved to compel responses to his discovery requests; the court once again found no good cause to extend discovery and denied Jones's motion.

The magistrate judge then denied Jones's Rule 56(f) motion and issued Findings and Recommendations (which the district court judge later adopted in full as his opinion). One of the magistrate judge's recommendations was that the court grant summary judgment to defendants on Jones's free exercise claim, because Jones had not explained how his inability to participate in religious services inhibited his practice of religion. In Jones's Objections to the Findings, he attempted to expand his record by including a statement discussing the importance of religious services to his Christian faith.

A week after Jones filed his Objections, the district court adopted the Findings in full, granted summary judgment to the defendants, and denied summary judgment to Jones. The court first applied California's one-year statute of limitations for personal injury claims and found all claims accruing prior to December 29, 1999, to be time-barred. Though the court denied Eleventh Amendment immunity to Blanas and determined that the County could be subject to liability for Blanas's actions under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), the court found that defendants were entitled to summary judgment as to all of Jones's claims. On Jones's free exercise claim, the court found that Jones "had not explained how a general denial of access to religious services . . . denied him his ability to practice his own religion (assuming of course

that plaintiff is religious)." On Jones's access to the courts claim, the court found that Jones "failed to present any evidence indicating that he had been injured in any way by his inability to participate in 'law library activities,' as he must do pursuant to *Lewis v. Casey*," 518 U.S. 343, 351, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996). On Jones's unreasonable search claim, the court found that Jones "had not presented anything indicating defendant Blanas was involved in the search in any way, nor that the search was conducted pursuant to a policy adopted by the County." Finally, as to Jones's due process claim, the court found that none of Jones's conditions of confinement rose to the level of a constitutional violation. Specifically, the court concluded that Jones had not established a right to any particular amount of recreation, exercise, or fresh air and sunlight, or identified any condition "objectively serious enough to implicate plaintiff's constitutional rights."[2] Pursuant to the district court's opinion, summary judgment was entered for defendants on September 27, 2002.

The timeliness of the appeal is contested. Jones's notice of appeal was dated October 24, 2002, and he attested in writing that he deposited it in the Atascadero State Hospital mail system on that date, with postage prepaid. The district court docketed the notice of appeal on October 29, 2002.

B. Outcome at the Ninth Circuit

In a published opinion, the U.S. Circuit Court of Appeals for the Ninth Circuit held that Jones' notice of appeal was timely, 393 F.3d at 926-27, App. at pp. 9a-10a, and reversed the summary judgment that had been entered by the district court. 393 F. 3d at 936, App. at pp. 25a-26a. In so doing, the Ninth Circuit held that the Jones had failed to present any evidence that would support his claim that he had been denied access to the courts. 393 F. 3d at 936, App. at pp. 25a-26a. Despite that, and regardless of the undisputed fact that Jones had unlimited access to his attorneys while at the Sacramento County Jail,

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[2] The court also granted summary judgment on Jones's remaining claims, which /were not/ raised in this appeal.

and notwithstanding the reality that he had enhanced access to civil courts during that time, the Court of Appeals surmised Jones's claims were not untimely under California's doctrine of equitable tolling. 393 F.3d at 927-29, App. at pp. 10a-15a.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Answering the question presented by this Petition in the affirmative, as the Ninth Circuit did in its published opinion, will encourage rapists and child sex abusers to strain judicial and public resources – precious assets that are better allocated toward keeping such potential recidivists away from their conceivable victims. Sex offenders will be able to tax judicial economy and syphon public treasuries by withholding any challenge to the terms of their civil confinement in a local jail while their status is being adjudicated in state court. Indeed, since their status would remain that of civil detainees after they are committed to a state hospital, the Ninth Circuit's opinion will enable these depraved individuals to toll the limitations period for the entire and indefinite period of their commitment.

Consequently, sexually violent predators like OSCAR W. JONES – who enjoy enhanced access to attorneys and the courts while they are detained in local jails – will wait until evidence that is unfavorable to their claims against sheriffs and counties becomes stale before contesting the conditions of their detention in the local jails. Once the stagnation of evidence has placed local governments at a disadvantage in defending against such claims, these sex offenders will file an action in a federal district court challenging the terms of their distant confinement under 42 U.S.C. § 1983. In that vein, sexually violent predators will become fixated on filing their actions in federal courts in California because state courts will not be bound by the panel's opinion on a question of state law.

The Ninth Circuit's opinion did not give due weight to such practical consequences. Moreover, the Court of Appeals overlooked undisputed facts in the record that were cited by Appellees demonstrating that JONES did not suffer an inability to contact or retain

counsel, or to avail himself of judicial processes while he was detained. Thus, Petitioners now seek review by this Court for two reasons: First, to prevent sexually violent predators like JONES from improperly taxing the federal judiciary; and second, to keep such sex offenders from gaining an unfair advantage (through the indefinite passage of time) in their attempts to raid the coffers of local governments. These undesirable outcomes will become inevitable should the Ninth Circuit's published opinion be permitted to stand uncorrected.

A. The Court of Appeal Stated But Did Not Apply the Correct Standard of Review

The district court found that tolling was not applicable to the statute of limitations regarding JONES' claims. *Compare* App. at pp. 33a-34a (magistrate judge's finding and recommendation that tolling does not apply), *and* App. at pp. 27a-28a (district court's order adopting magistrate's findings and recommendations in full). Accordingly, the Ninth Circuit properly noted that "[a] district court's decision whether to apply equitable tolling is generally reviewed for abuse of discretion, but where the relevant facts are undisputed, review is de novo." Jones, 393 F.3d at 396, App. at p. 8a (citing Santa Maria v. Pac. Bell, 202 F.3d 1170, 1175 (9th Cir. 2000)). Because the Court of Appeals thereafter expressly utilized the de novo standard, Jones, 393 F.3d at 928 n.6, App. at p. 8a, it must accept the undisputed fact that JONES "received unlimited visits from his legal counsel,"and that he had "broad access" to his attorneys and the court at all times that he was in the Sacramento County Jail.[3]

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[3] On the other hand, if the Ninth Circuit did not accept such facts as undisputed – or if the panel preferred to think that JONES' contact with his attorneys was somehow limited, or that his access to judicial processes was somehow restrained, or that there is some question concerning the number of times JONES visited with his attorneys or visited the court while detained at the Sacramento County Jail – then the abuse-of-discretion standard would have governed the outcome. Under that standard, the Court of Appeal should have refrained from disturbing the district court's decision regarding equitable tolling unless that decision was "clearly against the logic and effect

B. The Analysis in the Published Opinion Overlooks Material Points of Fact and Law

Whatever standard of review is utilized, the district judge did not err in finding that equitable tolling was inapplicable, nor did the district court render a judgment that was contrary to the logic and effect of the facts contained in the record and found by the magistrate judge. In reaching a contrary conclusion and reversing the district court, the Court of Appeals failed to recognize the significance of the undisputed facts and drew unsupported inferences contrary to those facts from the bare circumstance that JONES happened to be a civil detainee during the time that the limitations clock was ticking.

"The purpose of California's equitable tolling doctrine is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." Jones, 393 F.3d at 928, App. at p. 12a (internal quote marks and citations omitted). To apply the doctrine, one must weigh the potential injustice that a plaintiff would suffer by barring his claim against the vital public interest manifested in the statute of limitations. 393 F.3d at 928, App. at p. 12a.

On Petitioners' side of the scale, "[f]airness to the defendant requires that a case be brought when memories have not been affected by time, when all pertinent witnesses can still be called, and when physical evidence has not been destroyed or dispersed . . . [and also] the public has an interest in avoiding the cultivation of stale grievances and grudges." 393 F.3d at 928, App. at p. 12a. On the other side of the scale, the Ninth Circuit placed the would-be "injustice arising from a refusal to toll the statute of limitations . . . for the disability of [JONES'] imprisonment." 393 F.3d at 928, App. at p. 13a. But the Court of Appeals' own notions about the "disability of JONES'

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of the facts as are found." Horphag Research Ltd. v. Pellegrini, 337 F.3d 1036, 1042 (9th Cir. 2003) (tracing the parameters of the abuse-of-discretion standard).

imprisonment" obscured glaring facts in the record that demonstrate, indisputably, that no such disability existed.

The panel's opinion is founded upon the erroneous premise that "the key fact pertaining to the applicability of equitable tolling [is] Jones's civil commitment," Jones, 393 F.3d at 928 n.6, App. at p. 12a– even though the panel acknowledged that the California statute that tolls a statute of limitations period for the disability of imprisonment does not apply to civil detainees such as JONES. 393 F.3d at 927, App. at p. 12a. From there, and ***without citing any evidence***, the panel extrapolated that "civil detainees, like their criminal counterparts, suffer from more limited ability to investigate their claims, to contact lawyers, and to avail themselves of the judicial process." 393 F.3d at 928, App. at p. 13a (internal quotation marks and citation omitted). This notion completely ignores the procedures mandated by the SVPA – particularly §§ 6602 and 6603 of the California Welfare and Institutions Code – which afforded JONES a probable-cause hearing, a trial by jury, and the assistance of court-appointed counsel ("CAC").

Taking its unfounded speculation a step further, the Ninth Circuit surmised that JONES' being "held in the general jail population . . . was thus subject to . . . obstacles to litigation . . . identical to those of a criminal inmate . . . [and that] his 'civil' label did not afford him any greater access to lawyers, legal materials, or the tools of discovery than his criminal cell mates had." Jones, 393 F.3d at 929, App. at p. 14a.

The Court of Appeals ultimately reached the unsubstantiated conclusion that the conditions of confinement faced by sexually violent predators awaiting a civil-commitment trial allows no means by which these individuals may "acquire the legal ammunition necessary to challenge [the conditions of their confinement] before [the] statute of limitations has run." 393 F.3d at 929-30, App. at p. 14a.

These unfounded suppositions are questionable in light of the Ninth Circuit's simultaneous conclusion that JONES failed to proffer any allegation or evidence to support his claim that he was denied

access to the courts. 393 F.3d at 936, App. at p. 16a. Furthermore, these assumptions become completely unsustainable when juxtaposed with the undisputed evidence in the record.

Specifically, JONES received ***unlimited visits from his attorneys*** **and** ***had broad access to his lawyers and the courts*** during the time that he was housed in the Sacramento County Jail. App. at p. 35a, finding number five. In fact, ***JONES' own complaint alleges that he made numerous court appearances*** during the time that he was detained at the Sacramento County Jail. The Inmate Movement History Records, which are part of the record on appeal, reveal that ***he made forty-two court appearances and had twenty-one visits with his attorneys*** between December 16, 1997, and December 13, 1999. The minute orders of the state court, which are also part of the appellate record, corroborate this information. Petitioners did not waive their arguments on this score, but urged them in their appellate brief.

Additionally, the Ninth Circuit failed to take account of important aspects of California law; specifically, "that proceedings under the [SVPA] are ***civil*** in nature . . . [and], unless otherwise indicated on the face of the statute, Rules of Civil Procedure will operate." People v. Superior Court, 87 Cal.App.4th 122, 128, 105 Cal.Rptr.2d 159 (2001) (emphasis added).[4] Accordingly, JONES should have filed a cross-complaint against Appellees in the state court SVPA proceedings insofar as his challenges to the terms of his confinement related to the state's petition, probable-cause hearing and trial to hold and commit him as a sexually violent predator. *See* CAL. CIV. PROC. CODE § 426.30 (mandating that related causes of action be asserted in cross-complaints); Cheiker v. Prudential Ins. Co. of Am., 820 F.2d 334, 336-37 (1987) (analyzing what constitutes a "related cause of action," and holding that California's compulsory cross-complaint statute bars subsequent federal actions that are based upon

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[4] *But see* Bagration v. Superior Court, 110 Cal.App.4th 1677, 1682, 3 Cal.Rptr.3d 292, 295 (2003) (holding that summary judgment is not available in proceedings under the SVPA).

claims related to previous state court actions that could have been raised in that forum); *compare also* Fed. R. Civ. P. 13.

When all is said and done, JONES should have and very well could have consulted with his attorneys and utilized the state court SVPA process to challenge the constitutionality of his confinement in the Sacramento County Jail. Instead of complying with California's laws regarding cross-complaints, JONES delayed until after those proceedings had concluded, and until evidence that may detract from his claims had become unretrievable, before he set about molesting judicial resources and public treasuries.

In view of the fact that he had extensive contact with his attorneys and frequent interaction with the judicial process, but never raised his claims in state court, it is completely erroneous to conclude that JONES had "acted in good faith to pursue his claims, [or that] the balance tips sharply in favor of equitably tolling the statute of limitations." Jones, 393 F.3d 929-30, App. at p. 15a.

C. The Opinion Will Have Undesirable Legal Consequences for Local Governments and for Federal Courts

Beyond the problems presented by factual inaccuracies and unfounded assumptions that form the basis for the published opinion, Petitioners respectfully submit that the Ninth Circuit's holding is unacceptably flawed in a manner that has serious consequences – both for the federal judiciary and for local governments. The opinion places local governments at an unwarranted disadvantage, as they will incur great costs scrambling to find departed witnesses, to locate old documents, to refresh foggy recollections, and to resurrect other dormant evidence to defend against these actions.

Indeed, the Golden State is home to more than 63,000 sex offenders, *see* http://meganslaw.ca.gov, all of whom, as likely recidivists, stand a fair chance of being civilly detained in a local jail and committed to a state hospital under the SVPA. These rapists and pedophiles will have ample time, upon commitment at Atascadero State

Hospital, to plot revenge against those who kept them away from potential victims.

Their vendettas will take the form of challenges to the ancient conditions of their civil confinement, and they will file their vindictive lawsuits almost exclusively in federal courts that are bound by the Ninth Circuit's interpretations of California law. *See* Illeto v. Glock, Inc., 370 F.3d 860, 866 (9th Cir. 2004) (Callahan, J., dissenting from order denying en banc review) ("California state courts are free to disregard the panel's decision, but federal district courts in California are not.").[5]

CONCLUSION

In sum, allowing a sexually violent predator to sit on dubious claims, when he could have raised them in state court proceedings through his court-appointed counsel, is not equitable. Additionally, if not corrected, the Court of Appeals' misguided interpretation of California's equitable-tolling doctrine will only serve to draw undesirable cases such as this to federal courts. Therefore, Petitioners respectfully submit that the Ninth Circuit's published opinion in this case must be reformed in the interests of judicial economy, equity, and justice.

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[5] The notion that state courts might be inclined to disregard the Ninth Circuit's opinion is not far fetched. *See* Venegas v. County of Los Angeles, 32 Cal.4th 820, 862, 11 Cal.Rptr.3d 692, 723 (2004) (Werdegar, J., concurring and dissenting) ("Until this question is resolved, federal district courts in California will be required to follow one rule . . . while California superior courts will be required to follow the opposite rule."). In fact, it would appear that California is not as troubled by the confinement of sexually violent predators. *See* Claire Cooper, Court Rejects Sex Offender's Term Appeal, THE SACRAMENTO BEE, Jan. 27, 2005, at A5 ("The California Supreme Court on Wednesday rejected a sex offender's appeal of a potential life sentence for failing to re-register his address after moving.").

Dated: May 25, 2005

Respectfully submitted,

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Supreme Court, U.S.
FILED

04 16 09 MAY 25 2005

OFFICE OF THE CLERK

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SUPREME COURT OF THE UNITED STATES

COUNTY OF SACRAMENTO and LOU BLANAS, Sheriff,
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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
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PETITIONERS' APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSCAR W. JONES, Plaintiff - Appellant, v. LOU BLANAS; COUNTY OF SACRAMENTO, Defendants - Appellees.	No. 02-17148 D.C. No. CV-00-2811-WBS(JFM) Eastern District of California, Sacramento ORDER

FILED
Feb 24 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: B. FLETCHER, NOONAN, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Thomas votes to deny the petition for rehearing en banc and Judges B. Fletcher and Noonan so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSCAR W. JONES, *Plaintiff - Appellant,* v. LOU BLANAS; COUNTY OF SACRAMENTO, *Defendants - Appellees.*	No. 02-17148 D.C. No. CV-00-2811-WBS(JFM) OPINION

Appeal from the United States District Court
for the Eastern District of California
William S. Shubb, Chief Judge, Presiding

Argued and Submitted
November 1, 2004 – San Francisco, California

Filed December 27, 2004

Before: Betty B. Fletcher, John T. Noonan, and
Sidney R. Thomas, Circuit Judges,

Opinion by Judge Betty B. Fletcher

COUNSEL

Darrell A. Fruth, Farella, Braun & Martel, San Francisco, California, for the plaintiff-appellant.

David A. Melton, Porter, Scott, Weiberg & Delehant, Sacramento, California, for the defendants-appellees. With him on the briefs was Terence J. Cassidy.

OPINION

B. FLETCHER, Circuit Judge:

Plaintiff-appellant Oscar W. Jones ("Jones") appeals from a grant of summary judgment in his 42 U.S.C. § 1983 action in favor of defendants-appellees Sheriff Lou Blanas and the County of Sacramento. Jones seeks damages based on violations of his constitutional rights while he was confined in jail as a civil detainee. He had completed his criminal sentence, but was awaiting proceedings under California's Sexually Violent Predator Act. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part the grant of summary judgment, and we remand for additional discovery. We further direct the district court to appoint counsel for Jones.

I. BACKGROUND

Our summary of the facts reflects two important principles. First, as this is an appeal from summary judgment, we view the evidence in the light most favorable to Jones, the nonmoving party. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc). Second, because Jones is pro se, we must consider as evidence in his opposition to summary judgment all of Jones's contentions offered in motions and pleadings, where such contentions are based on personal knowledge and set forth facts that would be admissible in evidence, and where Jones attested under penalty of perjury that the contents of the

motions or pleadings are true and correct. *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir. 1987) (verified pleadings admissible to oppose summary judgment); *Johnson v. Meltzer*, 134 F.3d 1393, 1399-1400 (9th Cir. 1998) (verified motions admissible to oppose summary judgment); *Schroeder v. McDonald*, 55 F.3d 454, 460 n.10 (9th Cir. 1995) (pleading counts as "verified" if the drafter states under penalty of perjury that the contents are true and correct).

At issue in this case is whether Jones's constitutional rights were violated while he was civilly detained in the Sacramento County Jail under California's Sexually Violent Predator Act (SVPA), Cal. Welf. & Inst. Code § 6600 et seq. The SVPA authorizes the state to seek the involuntary commitment of any person who has been convicted of certain enumerated violent sex offenses against at least two victims and who has a diagnosed mental disorder that makes the person a dangerous likely recidivist. *Id.* § § 6600(a)(1), 6601(a)(1). When an individual in state custody is identified by the Director of Corrections as a candidate for commitment under the SVPA, the state may continue to hold him for 45 days beyond his scheduled release date for an evaluation by the state Department of Mental Health. *Id.* § § 6601(c)-(i); 6601.3. If a judge determines there is probable cause to believe the individual is likely to commit sexually violent offenses upon release, the judge must order a trial to determine whether the individual is a sexually violent predator as defined in the act. *Id.* § 6602(a). The individual is to "remain in custody in a secure facility" until the completion of the trial. *Id.* If the court (or jury, upon request, *id.* § 6603(a)) concludes beyond a reasonable doubt that the individual is a sexually violent predator, the individual is to be civilly committed for two years "for appropriate treatment and confinement in a secure facility." *Id.* § 6604.

Though the SVPA does not specify any particular type of "secure facility" in which detainees under the law are to be held, state law provides that individuals who are held under civil process must be "confined separately and distinctly" from individuals awaiting criminal trials and from individuals held under criminal sentence. Cal. Penal Code § 4001; *see also id.* § 4002(a) ("Persons committed on criminal process and detained for trial, persons convicted and under sentence,

and persons committed on civil process, shall not be kept or put in the same room."). In 2001, the California legislature added the following provision: "Inmates who are held pending civil process under the sexually violent predator laws shall be held in administrative segregation. For purposes of this subdivision, administrative segregation means separate and secure housing that does not involve any deprivation of privileges other than what is necessary to protect the inmates and staff." *Id.* § 4002(b).

In June 1997, Jones was incarcerated at the Susanville State Prison for a parole violation. On December 3, 1997, shortly before the conclusion of Jones's six-month sentence, he was transferred to the Sacramento County Jail to await a hearing on a petition for commitment as a sexually violent predator; the following day, the court ordered Jones detained at that facility under the SVPA. Although the SVPA requires a probable cause hearing within 55 days, *see* Cal. Welf. & Inst. Code § § 6601.3, 6601.5, it was not until September 16, 1998, that the state superior court found probable cause to continue to hold Jones for SVPA commitment proceedings. On December 13, 1999, at the conclusion of Jones's trial by jury, he was found to be a sexually violent predator. Jones was committed to Atascadero State Hospital on January 4, 2000.

In total, Jones was incarcerated at the Sacramento County Jail from December 3, 1997, to January 4, 2000, a period of over two years. For roughly the first year of his time at the County Jail -- from December 3, 1997, to December 9, 1998 -- Jones was housed with the general criminal population of the Jail. For Jones's remaining time at the Sacramento County Jail -- from December 9, 1998, to January 4, 2000 -- he was housed in an administrative segregation unit known as "T-Sep." According to the declaration of a sheriff's deputy, this is not a disciplinary housing unit. However, in T-Sep Jones was subject to far more restrictive conditions than those afforded to the general jail population. Jones's recreational activities were completely taken away, and he was allowed only one hour of exercise every other day. Phone calls and visiting privileges were considerably more limited in T-Sep. The time Jones was allowed out of his cell was reduced more than

tenfold. Jones was denied access to religious services. Jones's law library access was considerably curtailed: while in T-Sep, Jones was denied physical access to the law library; he could request, by citation only, copies of cases no more than twenty pages long.

Throughout his time at the Sacramento County Jail, Jones was subjected to numerous strip searches, some of which were conducted outdoors, and many of which were conducted at gunpoint in the middle of the night and accompanied by various intimidating tactics including poking with large weapons. On at least three occasions, Jones was led to the outside recreation area; forced at gunpoint to remove all clothing within the sight of many deputies (including female deputies); forced to lift his penis and testicles for inspection, run his fingers through his hair, then run his fingers inside his mouth; and forced to bend over, spread his buttocks apart with his hands, and cough three times.

On December 29, 2000, Jones brought this 42 U.S.C. § 1983 action against Sheriff Lou Blanas and the County of Sacramento for damages based on violations of his constitutional rights during the twenty-five-month period he was confined awaiting adjudication and eventually commitment under the SVPA.[1] On appeal, Jones claims that Blanas and the County violated his rights to free exercise of religion, access to the courts, freedom from unreasonable searches, and substantive due process as to conditions of confinement. Jones also claims that the district court abused its discretion in preventing adequate discovery.

On July 6, 2001, the magistrate judge ordered a four-month discovery period, with written discovery requests due sixty days before the end of the discovery period. Some of Jones's discovery requests were timely; some were filed several weeks after the deadline. On October 24, 2001, Jones moved the court for a thirty-day extension of discovery, because mail service had been discontinued at Atascadero due to the events of September 11, 2001, and because of disagreements

[1] Jones included several other officials as defendants; the magistrate judge refused service on these defendants because Jones had not stated a claim against them upon which relief could be granted. Jones does not challenge these dismissals here.

with the defendants over discovery. Stating that Jones had failed to show good cause for an extension, the court denied the motion.

Blanas and the County soon thereafter moved for summary judgment. Jones responded first with a cross-motion for summary judgment, and then with a motion to stay defendant's summary judgment pursuant to Federal Rule of Civil Procedure 56(f). Jones also moved to compel responses to his discovery requests; the court once again found no good cause to extend discovery and denied Jones's motion.

The magistrate judge then denied Jones's Rule 56(f) motion and issued Findings and Recommendations (which the district court judge later adopted in full as his opinion). One of the magistrate judge's recommendations was that the court grant summary judgment to defendants on Jones's free exercise claim, because Jones had not explained how his inability to participate in religious services inhibited his practice of religion. In Jones's Objections to the Findings, he attempted to expand his record by including a statement discussing the importance of religious services to his Christian faith.

A week after Jones filed his Objections, the district court adopted the Findings in full, granted summary judgment to the defendants, and denied summary judgment to Jones. The court first applied California's one-year statute of limitations for personal injury claims and found all claims accruing prior to December 29, 1999, to be time-barred. Though the court denied Eleventh Amendment immunity to Blanas and determined that the County could be subject to liability for Blanas's actions under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), the court found that defendants were entitled to summary judgment as to all of Jones's claims. On Jones's free exercise claim, the court found that Jones "had not explained how a general denial of access to religious services . . . denied him his ability to practice his own religion (assuming of course that plaintiff is religious)." On Jones's access to the courts claim, the court found that Jones "failed to present any evidence indicating that he had been injured in any way by his inability to participate in 'law library activities,' as he must do pursuant to *Lewis v. Casey,*" 518 U.S. 343, 351 (1996). On Jones's unreasonable search

claim, the court found that Jones "had not presented anything indicating defendant Blanas was involved in the search in any way, nor that the search was conducted pursuant to a policy adopted by the County." Finally, as to Jones's due process claim, the court found that none of Jones's conditions of confinement rose to the level of a constitutional violation. Specifically, the court concluded that Jones had not established a right to any particular amount of recreation, exercise, or fresh air and sunlight, or identified any condition "objectively serious enough to implicate plaintiff's constitutional rights."[2] Pursuant to the district court's opinion, summary judgment was entered for defendants on September 27, 2002.

The timeliness of the appeal is contested. Jones's notice of appeal was dated October 24, 2002, and he attested in writing that he deposited it in the Atascadero State Hospital mail system on that date, with postage prepaid. The district court docketed the notice of appeal on October 29, 2002.

II. STANDARDS OF REVIEW

A district court's dismissal of a claim based on a statute of limitations is reviewed de novo. A district court's decision whether to apply equitable tolling is generally reviewed for abuse of discretion, but where the relevant facts are undisputed, review is de novo. *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000).

District court rulings concerning discovery are reviewed for abuse of discretion. *Kulas v. Flores*, 255 F.3d 780, 783 (9th Cir. 2001). The same standard applies to a district court's decision not to permit additional discovery pursuant to a motion under Federal Rule of Civil Procedure 56(f). *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002).

Finally, a district court's decision to grant or deny summary judgment is reviewed de novo. On appeal, the reviewing court applies

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[2] The court also granted summary judgment on Jones's remaining claims, which have not been raised in this appeal.

the same standard used by the trial court: specifically, the court must "determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc). A district court's conclusions of law are reviewed de novo. *Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072, 1076 (9th Cir. 2003).

III. ANALYSIS

A. Timeliness of the Appeal

As a threshold matter, we must determine whether Jones's appeal to this court was timely filed. We conclude that it was.

[1] A notice of appeal must be filed within 30 days from the entry of judgment, Fed. R. App. P. 4(a). A notice filed by "an inmate confined in an institution" is considered timely if "deposited in the institution's internal mail system on or before the last day for filing," Fed. R. App. P. 4(c)(1). Timely filing under this rule "may be shown by a declaration in compliance with 28 U.S.C. § 1746" setting forth the date of deposit and stating that postage has been prepaid. *Id.* Under 28 U.S.C. § 1746, a matter may be proved by a signed statement, executed within the United States, that reads: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date)."

[2] The defendants contend that because Jones is a civil detainee rather than a prisoner, he cannot benefit from Rule 4(c), the so-called "prisoner mailbox rule." This contention is clearly contrary to the text of the rule, which by its terms -- and in spite of its popular nickname -- applies broadly to any "inmate confined in an institution." There is no express limitation of the rule's application to prisoners, or to penal institutions, and neither the rule itself nor defendants suggest any reason to infer such a limitation.

[3] Jones is undisputably an inmate confined in an institution, specifically the Atascadero State Hospital. The judgment from which Jones appeals was entered on September 27, 2002. In a statement made in conformity with 28 U.S.C. § 1746, Jones attested that he deposited his notice of appeal (with postage prepaid) in the Atascadero State Hospital mail system on October 24, 2002. As he has complied with the requirements of Rule 4(c) within the 30-day period from the entry of judgment, Jones's appeal is timely.[3]

B. Statute of Limitations

Jones filed his complaint on December 29, 2000. Applying California's then-applicable one-year statute of limitations for personal injury actions, the district court concluded that Jones's claims accruing prior to December 29, 1999 (approximately one week before Jones was transferred out of the Sacramento County Jail), were time-barred. The district court did not consider equitable tolling.

[4] For actions under 42 U.S.C. § 1983, courts apply the forum state's statute of limitations for personal injury actions, along with the forum state's law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law. *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). At the time Jones filed his suit, and at the time of the district court's decision, California's statute of limitations for personal injury actions was one year. *See* Cal. Civ. Proc. Code § 340.3 (West Supp. 2002). Effective January 1, 2003, the new California statute of limitations for assault, battery, and other personal injury claims is two years instead of one. Cal. Civ. Proc. Code

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[3] Citing *Miller v. Sumner*, 921 F.2d 202 (9th Cir. 1990), defendants contend that Fed. R. App. P. 4(c) does not apply because Jones deposited his notice of appeal in the U.S. mail. Our court has already squarely rejected this argument. *See Koch v. Ricketts*, 68 F.3d 1191, 1193 (9th Cir. 1995) (observing that *Miller* predated the enactment of Rule 4(c) and holding unnecessary under Rule 4(c) the *Miller* requirement that an inmate file his notice of appeal in a manner that creates a mail log).

§ 335.1 (West Supp. 2004). Though a § 1983 action filed in California today would clearly be governed by California's new two-year statute of limitations for personal injury actions, *Fink*, 192 F.3d at 914, we have held that the new statute of limitations does not apply retroactively, *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004), and so the appropriate limitations period remains one year in Jones's case.[4] Therefore the district court applied the correct limitations period.

Though California law provides for the tolling of a statute of limitations for a period of up to two years based on the disability of imprisonment, the language of the tolling provision applies only to plaintiffs "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life." Cal. Civ. Proc. Code § 352.1.[5] Thus the literal language of the statute does not cover Jones, a civil detainee. *See Hubbart v. Superior Court*, 969 P.2d 584, 605-11 (Cal. 1999) (treating SVPA detention as civil in nature).

[5] However, the district court erred in failing to apply equitable

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[4] The Ninth Circuit has held that federal courts should apply federal law in determining whether a new state statute of limitations applies retroactively. *TwoRivers v. Lewis*, 174 F.3d 987, 993 (9th Cir. 1998); *accord*, *Fink*, 192 F.3d at 914. The *Maldanado* court's conclusion is unaffected if the question is analyzed under federal, rather than state, retroactivity law. *See Chenault v. United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994) (holding that under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party and increase a party's liability" (internal punctuation omitted)).

[5] The California courts have read out of the statute the qualification that the period of incarceration must be "for a term less than for life" in order for a prisoner to qualify for tolling. *Grasso v. McDonough Power Equipment, Inc.*, 70 Cal.Rptr. 458, 460-61 (Cal. Ct. App. 1968); *see also Martinez v. Gomez*, 137 F.3d 1124, 1126 (9th Cir. 1998) (recognizing the continuing vitality of *Grasso*).

tolling.[6] Equitable tolling under California law "'operates independently of the literal wording of the Code of Civil Procedure' to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." *Lantzy v. Centex Homes*, 73 P.3d 523 (Cal. 2003) (citation and internal quotation marks omitted). The purpose of California's equitable tolling doctrine "is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1137 (9th Cir. 2001) (en banc) (quoting *Addison v. State*, 578 P.2d 941, 942 (Cal. 1978)) (internal quotation marks omitted). Thus California courts apply equitable tolling "to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice." *Lantzy*, 73 P.3d at 523. Application of California's equitable tolling doctrine "requires a balancing of the injustice to the plaintiff occasioned by the bar of his claim against the effect upon the important public interest or policy expressed by the ... limitations statute." *Id.* at 524 (quoting *Addison*, 578 P.2d at 945) (internal quotation marks omitted) (omission in original).

On one side of the balance in this case is the generic public policy interest in ensuring prompt resolution of legal claims. *See Addison*, 578 P.2d at 942-43. Fairness to the defendant requires that a case be brought when memories have not been affected by time, when all pertinent witnesses can still be called, and when physical evidence has not been destroyed or dispersed. In addition to these evidentiary concerns, the public has an interest in avoiding the cultivation of stale grievances and grudges. Statutes of limitations are not legalistic gimmicks but embody the experience of Anglo-American law that it is sound public policy to set a specific time within which a given legal action may be brought. But if some obstacle unanticipated by the legislature has prevented a plaintiff from pursing his claim, equity may find a way around the statute. *See Lantzy*, 73 P.3d at 524.

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[6] Because the key fact pertaining to the applicability of equitable tolling -- Jones's civil commitment -- is undisputed, the district court's refusal to apply equitable tolling is reviewed de novo. *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000).

The injustice arising from a refusal to toll the statute of limitations for Jones would be great, particularly in light of California's tolling provision for the disability of imprisonment. Observing that the law provides for tolling for criminal inmates "in recognition of their more limited ability to investigate their claims, to contact lawyers and to avail themselves of the judicial process," we have emphasized that "in terms of limitations on the prisoner, continuous custody is the relevant disability." *Elliott v. City of Union City*, 25 F.3d 800, 803 (9th Cir. 1994). For this reason, we have held that "actual, uninterrupted incarceration is the touchstone" for applying California's tolling provision for the disability of imprisonment. *Id.* (quoting *Bianchi v. Bellingham Police Department*, 909 F.2d 1316, 1318 (9th Cir. 1990)) (internal quotation marks omitted).

The rationale behind the "actual, uninterrupted incarceration" rule applies with equal force to the case of an individual continuously detained under civil process. As the California Supreme Court recognized long ago, "the destruction of an individual's personal freedoms effected by civil commitment is scarcely less total than that effected by confinement in a penitentiary." *People v. Burnick*, 535 P.2d 352 (Cal. 1975). Like criminal inmates, civil detainees litigate under serious disadvantages. The civilly confined are limited in their ability to interview witnesses and gather evidence, their access to legal materials, their ability to retain counsel, and their ability to monitor the progress of their lawsuit and keep abreast of procedural deadlines. *See Rand v. Rowland*, 154 F.3d 952, 958 (9th Cir. 1998) (cataloguing the litigation obstacles that arise from some of the "unique handicaps of incarceration"). Thus our rationale for the "actual, uninterrupted incarceration" rule in the context of tolling for criminal imprisonment is equally applicable to the context of civil confinement: civil detainees, like their criminal counterparts, suffer from "more limited ability to investigate their claims, to contact lawyers and to avail themselves of the judicial process." *Elliott*, 25 F.3d at 803.

Equitable tolling is particularly appropriate in Jones's case. For roughly the first half of the period in which Jones was confined awaiting SVPA adjudication, Jones was held in the general prison

population and was thus subject to conditions -- and therefore obstacles to litigation -- identical to those of a criminal inmate. For the second half of Jones's confinement, he was held in "T-Sep," where his access to the law library and to visitors was further curtailed. Thus at the beginning of Jones's civil confinement, his "civil" label did not afford him any greater access to lawyers, legal materials, or the tools of discovery than his criminal cellmates had; after Jones's transfer to T-Sep, the "civil" label actually afforded him less. To deny to Jones the same benefit that California's disability tolling provision affords to his criminally confined cellmates would yield the arbitrary result that two individuals housed in the same penal facility under the same or similar conditions would have differing access to the courts based solely on a difference in label.

The access to the courts claim Jones has brought in this lawsuit hints at another pernicious consequence of refusing to toll the statute of limitations for the civilly confined: such a rigid doctrine would effectively insulate from legal challenge the very confinement policies that may unconstitutionally restrict a detainee's access to justice in the first place. In this case, for example, Jones alleges conditions of confinement that would make the filing of a lawsuit practically impossible even for a trained attorney. The difficulties of conducting legal research under the restrictions Jones alleges -- no physical access to the law library, no access to cases twenty pages or longer, access to cases only by citation -- are self-evident. In this case, without tolling, the statute of limitations on Jones's § 1983 claims would have run while he was still confined in the Sacramento County Jail and still subject to the library restrictions he now challenges. Without equitable tolling to protect a civil detainee's access to justice, the harshest restrictions on legal research would be self-perpetuating: the harsher the restriction, the less likely it would be that a civil detainee could acquire the legal ammunition necessary to challenge it before his statute of limitations has run.

[6] For these reasons, in the case of a civil detainee who has acted in good faith to pursue his claims, the balance tips sharply in favor of equitably tolling the statute of limitations "to ensure fundamental

practicality and fairness," *Lantzy*, 73 P.3d at 523, and "to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." *Daviton*, 241 F.3d at 1137 (citation and internal quotation marks omitted). We therefore hold that California's equitable tolling doctrine operates to toll a statute of limitations for a claim asserted by a continuously confined civil detainee who has pursued his claim in good faith. The dismissal of Jones's claims accruing prior to December 29, 1999, must be reversed.

C. Conduct of Discovery

[7] Jones assigns error to the district court's series of denials of his requests to extend discovery, and to the court's related denial of Jones's Rule 56(f) motion to stay summary judgment. Under Rule 56(f), the court may postpone ruling on a summary judgment motion where the non-moving party needs "additional discovery to explore 'facts essential to justify the party's opposition.'" *Crawford-El v. Britton*, 523 U.S. 574, 599 n.20 (1998) (quoting Fed. R. Civ. Pro. 56(f)). Though the conduct of discovery is generally left to a district court's discretion, summary judgment is disfavored where relevant evidence remains to be discovered, particularly in cases involving confined pro se plaintiffs. *Klingele v. Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988); *Harris v. Pate*, 440 F.2d 315, 318 (7th Cir. 1971) (Stevens, J.) (observing that the combined disabilities of self-representation and confinement hinder a plaintiff's ability to gather evidence). Thus summary judgment in the face of requests for additional discovery is appropriate only where such discovery would be "fruitless" with respect to the proof of a viable claim. *Klingele*, 849 F.2d at 412.

In this case, Jones acted diligently and reasonably in pursuing discovery: he served one set of interrogatories within the allotted sixty days, then served another shortly after and moved the court to extend discovery when he needed more time and found himself in disagreement with the defendants. In spite of his efforts, due to the lack of counsel and the limitations in information and resources associated with Jones's confinement at Atascadero, he was simply unable to comply with the district court's schedule. The few discovery requests of

Jones's that appear in the record ask for documentation of the details of the strip searches of Jones: specifically, Jones requested jail records of the searches, including relevant correspondence and the names of participating officers. These requests seem highly relevant to Jones's Fourth Amendment claim. On the basis of these of requests alone, it is clear that additional relevant evidence remained to be discovered.

[8] The district court granted summary judgment to Blanas and the County on Jones's unreasonable search claim because Jones failed to present evidence implicating either Blanas or a Sacramento County policy in the searches to which Jones was subjected. However, Jones's discovery requests for jail records related to the searches may well have produced evidence that would have enabled Jones to tie the searches to policies of Blanas or the County. At least with respect to Jones's Fourth Amendment claim, then, additional discovery would not have been "fruitless," *Klingele*, 849 F.2d at 412, and the district court therefore abused its discretion in refusing to permit it. Summary judgment on the Fourth Amendment claim must accordingly be reversed.

[9] On Jones's access to courts claim, the district court granted summary judgment against Jones on account of deficiencies of evidence relating entirely to facts within Jones's own control: the injuries (or lack thereof) that Jones sustained as a result of the restrictions on his law library access. With respect to facts such as these, it is unlikely that additional discovery would have made a difference as to Jones's ability to present relevant evidence. Therefore such discovery would have been "fruitless," and so summary judgment with respect to his access to the courts claim should not be reversed on this basis.[7]

D. Substantive Due Process

Jones claims that Blanas and the County violated his substantive due process rights by confining him for a year among the general

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[7] It is not necessary to consider whether the district court's conduct of discovery warrants reversal with respect to the free exercise or substantive due process claims, as we find that summary judgment on these claims was inappropriate for other reasons.

criminal inmate population of the Sacramento County Jail and for another year in T-Sep, an administrative segregation unit where Jones experienced substantially more restrictive conditions than those prevailing in the Main Jail. While in T-Sep, Jones was afforded substantially less exercise time, phone and visiting privileges, and out-of-cell time than inmates in the general population. Jones was completely cut off from recreational activities, religious services, and physical access to the law library. Jones continued to be subjected to strip searches during this time.

According to the district court, Jones was required to establish that the defendants "deprived [him] of the 'minimal civilized measure of life's necessities'" (quoting *Rhodes v. Chapman*, 452 U.S. 337 (1981)). Under this standard, the district court found that Jones's claim could not succeed because he had not established a right to any particular amount of recreation, exercise, or fresh air and sunlight.

Though it purported to analyze Jones's conditions of confinement claim under the Fourteenth Amendment, the district court actually applied the standards that govern a claim of cruel and unusual punishment under the Eighth Amendment. The court mistook the amendment that was to be applied.

[10] "[T]he more protective fourteenth amendment standard applies to conditions of confinement when detainees . . . have not been convicted" of a crime. *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987) (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982) (civilly committed individuals), and *Bell v. Wolfish*, 441 U.S. 520 (1979) (pretrial detainees)). The Fourteenth Amendment requires the government to do more than provide the "minimal civilized measure of life's necessities," *Rhodes*, 452 U.S. at 347, for non-convicted detainees. Rather, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

The case of the individual confined awaiting civil commitment proceedings implicates the intersection between two distinct Fourteenth Amendment imperatives. First, "persons who have been involuntarily

committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 321-22. Second, when the state detains an individual on a criminal charge, that person, unlike a criminal convict, "may not be *punished* prior to an adjudication of guilt in accordance with due process of law." *Bell*, 441 U.S. at 535 (emphasis added); *see also Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004) ("The Fourteenth Amendment prohibits all punishment of pretrial detainees."). As civil detainees retain greater liberty protections than individuals detained under criminal process, *see Youngberg*, 457 U.S. at 321-24, and pre-adjudication detainees retain greater liberty protections than convicted ones, *see Bell*, 441 U.S. at 535-36, it stands to reason that an individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual and at least as great as those afforded to an individual accused but not convicted of a crime.

In light of these principles, the Eleventh Circuit held in *Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984), that individuals awaiting involuntary civil commitment proceedings may not constitutionally be held in jail at all. *Id.* at 1463. We need not go so far in order to decide this case. Here, it suffices to say that the conditions of confinement for an individual detained under civil process but not yet committed must be tested by a standard at least as solicitous to the rights of the detainee as the standards applied to a civilly committed individual and to an individual accused but not convicted of a crime.

[11] At a bare minimum, then, an individual detained under civil process -- like an individual accused but not convicted of a crime -- cannot be subjected to conditions that "amount to punishment." *Bell*, 441 U.S. at 536. Following *Bell*, we have recognized that punitive conditions may be shown (1) where the challenged restrictions are expressly intended to punish, or (2) where the challenged restrictions serve an alternative, non-punitive purpose but are nonetheless "excessive in relation to the alternative purpose," *Demery*, 378 F.3d at 1028 (quoting *Bell*, 441 U.S. at 538) (quotation marks and further citation omitted), or "are employed to achieve objectives that could be

accomplished in so many alternative and less harsh methods," *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1484 (9th Cir. 1993) (quoting *Bell*, 441 U.S. at 539 n.20) (quotation marks and internal punctuation omitted). Legitimate, non-punitive government interests include ensuring a detainee's presence at trial, maintaining jail security, and effective management of a detention facility. *Id.*

[12] The civil nature of SVPA confinement provides an important gloss on the meaning of "punitive" in this context. Because he is detained under civil -- rather than criminal -- process, an SVPA detainee is entitled to "more considerate treatment" than his criminally detained counterparts. *Youngberg*, 457 U.S. at 321-22. Therefore when a SVPA detainee is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to "punishment." *See Sharp v. Weston*, 233 F.3d 1166, 1172-73 (9th Cir. 2000) (finding that *Youngberg* required that individuals civilly confined at a commitment center receive "more considerate" treatment than inmates at the correctional center in which the commitment center was located).

In addition to comparing the conditions of confinement of pre-adjudication *civil* detainees to those of pre-trial *criminal* detainees, it is also relevant to compare confinement conditions of civil detainees *pre-adjudication* to conditions *post-commitment*. As the Eleventh Circuit has persuasively reasoned, "if pretrial detainees cannot be punished because they have not yet been convicted, [citing *Bell*], then [civil] detainees cannot be subjected to conditions of confinement substantially worse than they would face upon commitment." *Lynch*, 744 F.2d at 1461. Or, to put it more colorfully, purgatory cannot be worse than hell. Therefore when an individual awaiting SVPA adjudication is detained under conditions more restrictive than those the individual would face following SVPA commitment, we presume the treatment is punitive.

Seling v. Young, 531 U.S. 250 (2001), is not to the contrary. There the Supreme Court held that a sexually violent predator law was not subject to as-applied Ex Post Facto and Double Jeopardy challenges based on the lack of treatment received by a particular detainee under

the law. *Id.* at 263. The Court spoke only to the constitutionality of the sexually violent predator law itself, not the constitutionality of any particular conditions of confinement. As the Court explained, its decision "does not mean that [those] committed as sexually violent predators have no remedy for the alleged conditions and treatment regime" to which they are subjected: "due process requires that the conditions and duration of confinement . . . bear some reasonable relation to the purposes for which persons are committed." *Id.* at 265 (citing *Youngberg*, among other cases). It is the violation of this due process principle for which Jones seeks relief in this case.

Nor does the status of the sexually violent predator as one who has *previously* been convicted of crime limit the rights of one detained under the SVPA. *See Robinson v. California*, 370 U.S. 660, 666-67 (1962) (holding unconstitutional the conviction and punishment of an individual based on his "status"). In upholding the SVPA against challenge under the *Ex Post Facto Clause*, the California Supreme Court (following the United States Supreme Court) has stressed the civil nature of sexually violent predator commitment. *See Hubbart v. Superior Court*, 969 P.2d 584, 605-611 (Cal. 1999). In particular, the California Supreme Court noted that "the Legislature . . . made clear that, despite their criminal record, persons eligible for commitment and treatment as SVP's are to be viewed 'not as criminals, but as sick persons.'" *Id.* at 606 (citing Cal. Welf. & Inst. Code § 6250). The state cannot have it both ways. If the confinement of a sexually violent predator is civil for the purposes of evaluation under the Ex Post Facto Clause, that confinement is civil for the purposes of determining the rights to which the detainee is entitled while confined. Civil status means civil status, with all the Fourteenth Amendment rights that accompany it.

[13] Finally, we have held in *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003), that the Eighth Amendment's "deliberate indifference" standard of culpability does not apply in the context of an incapacitated criminal defendant's Fourteenth Amendment challenge to conditions of confinement. *Id.* at 1120-21. If an incapacitated *criminal* defendant need not prove "deliberate indifference" to state a substantive

due process claim, then neither should a *civil* detainee, who retains greater liberty protections than his criminal counterpart. *Youngberg*, 457 U.S. at 321-24.

In sum, a civil detainee awaiting adjudication is entitled to conditions of confinement that are not punitive. Under *Bell* and our circuit precedent, a restriction is "punitive" where it is intended to punish, or where it is "excessive in relation to [its non-punitive] purpose," *Demery*, 378 F.3d at 1028 (citation and internal quotation marks omitted), or is "employed to achieve objectives that could be accomplished in so many alternative and less harsh methods," *Hallstrom*, 991 F.2d at 1484 (citation and internal quotation marks omitted). With respect to an individual confined awaiting adjudication under civil process, a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held, or where the individual is detained under conditions more restrictive than those he or she would face upon commitment. Finally, to prevail on a Fourteenth Amendment claim regarding conditions of confinement, the confined individual need not prove "deliberate indifference" on the part of government officials.

[14] Applying this standard to Jones's case, we find that summary judgment must be reversed. While in the general population, Jones was subject to precisely the same conditions as criminal inmates. He was not afforded the "more considerate" treatment to which he is constitutionally entitled as a civil detainee. *Youngberg*, 457 U.S. 321-22. Thus, a presumption arises that Jones's year-long confinement in the general criminal population of the jail was punitive. This presumption is rebuttable, to be sure, and so on remand the defendants must be given an opportunity to explain what legitimate, non-punitive purpose justified Jones's detention under these conditions. But under *Bell* and circuit precedent, the defendants cannot justify holding Jones in the general criminal population for a year based solely on the generalized statutory requirement that Jones be detained in a "secure facility" while awaiting proceedings pursuant to the SVPA, *see* Cal. Welf. & Inst. Code § 6602, because Jones's detention appears "excessive in relation

to" this purpose, *Demery*, 378 F.3d at 1028 (citation and quotation marks omitted), and could have been carried out via "alternative and less harsh methods." *Hallstrom*, 991 F.2d at 1484 (citation and internal quotation marks omitted). In fact, the California Penal Code *demands* a "less harsh method" of confinement for SVPA detainees: namely, holding them separately from criminal detainees. Cal. Penal Code § § 4001, 4002(a). Thus California law itself suggests that Jones's detention in the general inmate population was "excessive."

[15] As for Jones's time in T-Sep, the declaration of the sheriff's deputy that T-Sep was "not a disciplinary category" is belied by the restrictions Jones and others faced while in T-Sep. The significant limitations on, or total denials of, recreational activities, exercise, phone calls, visitation privileges, out-of-cell time, access to religious services, and access to the law library, indicate that in numerous respects confinement in T-Sep was substantially more restrictive than confinement in the Main Jail. Thus a presumption of punitiveness arises as to Jones's year in T-Sep as well as his year in the general population. Once again, the defendants must have an opportunity to offer legitimate, non-punitive justifications, but a bare assertion of the requirement of keeping SVPA detainees separate from the general population pursuant to California Penal Code sections 4001 and 4002(a) will not suffice. While this goal imposed by state law is a sensible one, the state must show how the bevy of restrictions Jones faced in T-Sep was not "excessive in relation to" the purpose of keeping civil and criminal detainees separate, *Demery*, 378 F.3d at 1028 (citation and internal quotation marks omitted), and why this purpose could not have been achieved by "alternative and less harsh methods," *Hallstrom*, 991 F.2d at 1484 (citation and internal quotation marks omitted). If the criminal population can be safely housed without the restrictions of T-Sep, it is difficult to see why SVPA detainees could not be so housed as well.

[16] For these reasons, summary judgment as to Jones's substantive due process claim must be reversed. On remand, the government should be permitted to demonstrate legitimate, non punitive interests justifying the conditions of Jones's confinement, and to show that the restrictions

imposed on Jones were not "excessive" in relation to these interests. For his part, Jones should be permitted additional discovery to flesh out both the nature of the conditions in which he was held and the involvement of Blanas and of the County in subjecting him to these conditions.

E. Free Exercise

On Jones's free exercise claim, the district court granted the defendants summary judgment because Jones "had not explained how a general denial of access to religious services . . . denied him his ability to practice his own religion (assuming of course that plaintiff is religious)." In so concluding, the district court disregarded Jones's explanation in his Objections to Magistrate Judge's Findings and Recommendations, filed eight days before the district court adopted the magistrate's Findings in full. Specifically, Jones explained: "As a believer of the Christian faith I believe that we 'should not forsake the assembling of ourselves together' . . . . Without the benefit of communal services plaintiff was denied the uplifting of the spirit, the reassurance of fellow Christians that I am one with God, that we are saved by faith and not by deed. Plaintiff was denied the joy of communal praise of God" (quoting *Hebrews* 10:25 (King James)).

[17] Though a district court has discretion not to consider evidence offered for the first time in a party's objections to a magistrate judge's proposed findings and recommendations, the court "must actually exercise its discretion" rather than simply ignore the evidence or reject it *sub silentio*. *Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002). Because Jones was pro se and concluded his Objections with a signed statement attesting under penalty of perjury to their truth, Jones's explanation of his religious beliefs qualifies as evidence for the purpose of opposing a summary judgment motion. *Johnson v. Meltzer*, 134 F.3d 1393, 1399-1400 (9th Cir. 1998); *Schroeder v. McDonald*, 55 F.3d 454, 460 n.10 (9th Cir. 1995). The district court therefore erred in failing to exercise its discretion whether to consider Jones's explanation. *Brown*, 279 F.3d at 745. Moreover, given the circumstances under which this evidence was offered -- a pro se plaintiff, ignorant of the law, offering

crucial facts as soon as he understood what was necessary to prevent summary judgment against him -- it would have been an abuse of discretion for the district court not to consider the evidence. *See id.* (holding that even if the court had exercised its discretion whether to consider a pro se habeas petitioner's new argument raised in objections to a magistrate's report, refusal to consider the argument would have been an abuse of discretion).

[18] Jones's description of his religious beliefs could hardly have been clearer in specifying how the denial of access to religious services impinged upon his practice of his religion, and the district court should have considered this evidence. Therefore summary judgment on Jones's free exercise claim must be reversed.

F. Access to the Courts

[19] On Jones's access to the courts claim, the magistrate judge recommended summary judgment for the defendants because Jones "failed to present any evidence indicating that he had been injured in any way by his inability to participate in 'law library activities,' as he must do pursuant to *Lewis v. Casey*," 518 U.S. 343, 351 (1996). This is a correct statement of the law and a proper application. The district court is correct that Jones did not allege injury, such as inability to file a complaint or defend against a charge, stemming from the restrictions on his access to the law library. Therefore summary judgment on Jones's access to the courts claim was appropriate.

G. Additional Issues Raised by the Parties

The district court denied Eleventh Amendment immunity to Blanas and held that the County could be subject to liability for Blanas's actions under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Though Jones's briefs defend the propriety of these holdings, defendants do not disagree or request reversal.

In their briefs, the parties debate the questions whether Blanas may be held liable on a supervisory theory of liability, whether Blanas is entitled to qualified immunity in his personal capacity, and whether the

county should be held liable pursuant to *Monell*. Because the district court did not reach these issues since it found no constitutional violations, we decline to address these issues in the first instance. If and when these issues arise on remand, the district court should address them at that time.

IV. CONCLUSION

In summary:

1. Jones's appeal was timely because he was an "inmate confined in an institution" and complied with Rule 4(c).

2. We find that California's equitable tolling doctrine must apply to toll the statute of limitations for claims asserted by a continuously confined civil detainee who has pursued his claims in good faith. Because the district court erred in failing to apply equitable tolling, the district court's dismissal of Jones's claims accruing prior to December 29, 1999, is reversed.

3. The district court abused its discretion in denying Jones's requests to extend discovery and his motion to stay discovery pursuant to Rule 56(f). These errors require reversal of summary judgment as to Jones's unreasonable search claim. On remand, Jones must be permitted to reopen discovery.

4. The district court applied the wrong standard to Jones's substantive due process claim. Under the Fourteenth Amendment, a civil detainee awaiting adjudication is entitled to conditions of confinement that are not punitive, i.e. not intended to be punitive, excessive in relation to their non-punitive purpose, or employed for purposes that could be achieved by less harsh methods. Summary judgment on Jones's substantive due process claim is therefore reversed. On remand, the claim is to be evaluated according to the principles we have set forth.

5. On Jones's free exercise claim, the district court improperly granted summary judgment without exercising its discretion as to whether to consider key evidence Jones offered in his Objections to the magistrate judge's Findings. Failure to consider this evidence would

have been an abuse of discretion in any event. Summary judgment is therefore reversed on this claim.

6. Summary judgment against Jones was proper as to the access to the courts claim, because Jones failed to submit facts showing how the denial of access to the law library resulted in injury. Therefore summary judgment as to this claim is affirmed.

7. Because of the complexity and weightiness of Jones's claims, we instruct the district court on remand to appoint counsel to assist Jones in pursuing his case.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

OSCAR W. JONES, No. CIV S-00-2811 WBS JFM P

Plaintiff, ORDER

vs.

LOU BLANAS, et al.,

Defendants.

_____/

FILED

SEP 27 2002

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
by _____
Deputy Clerk

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On August 16, 2002, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within ten days. Plaintiff has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the records and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed August 16, 2002, are adopted in full;

2. Defendants' December 14, 2001 motion for summary judgment is granted;

3. Plaintiff's January 4, 2002 cross-motion for summary judgement is denied; and

4. This case is closed.

DATED: September 27, 2002.

/s/ WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

FILED
Aug 16 2002
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OSCAR W. JONES,
Plaintiff,

No.CIV S-00-2811 WBS JFM P

vs.

LOU BLANAS, et al.,
Defendants.

ORDER AND
FINDINGS AND
RECOMMENDATIONS

_____/

Plaintiff is a California civil detainee proceeding with this action for violation of civil rights pursuant to 42 U.S.C. § 1983.[1] Defendants' December 14, 2001 motion for summary judgment, and plaintiff's January 4, 2002 cross-motion for summary judgment[2] are now before the court.

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[1] On February 23, 2001, this court held, pursuant to 28 U.S.C. 1915(e)(2) that plaintiff's complaint states cognizable claims for relief against only defendants Blanas and the County of Sacramento (the County). Accordingly, claims raised in plaintiff's complaint which do not implicate Blanas or the County are no longer before the court.

[2] The court construes plaintiff's cross-motion also as an opposition to defendants' motion.

Before addressing the parties motions, the court notes that on January 14, 2002, plaintiff filed a motion asking that the court delay ruling on defendants' summary judgment motion until defendants respond to plaintiff's December 5, and December 17, 2001 requests for admissions. However, on March 1, 2002, the court ruled that defendants need not respond to those discovery requests. Accordingly, plaintiff's request for a stay will be denied.

Summary judgment is appropriate when it is demonstrated that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under summary judgment practice, the moving party

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient

to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 (amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nelsen Freight Lines, 602 F. Supp 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

On April 24, 2001, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999), and Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

Plaintiff generally complains that he suffered several violations of his constitutional rights between December 1, 1997 and January 4, 2000 while he was housed in the Sacramento County Jail (SCJ) during civil commitment proceedings held pursuant to California's Sexually Violent Predators Act (SVPA) [Cal. Welf. & Inst. Code § 6600 et seq.][3]

Defendants argue that any claims which accrued prior to December 29, 1999 are time-barred. California's statute of limitations and its tolling rules apply to § 1983 claims arising out of events occurring in California. See Fink v. Shedler, 192 F.3d 911, 914 (9th Cir. 1999). The applicable statute of limitations is one year from the time a cause of action accrues. Id. "Federal law . . . governs when a claim accrues. [Citation omitted.] A claim accrues when the plaintiff knows, or should know, of the injury which is the basis of the cause of action." Id. Plaintiff's complaint was filed on December 29, 2000.

Plaintiff asserts that he is entitled to tolling of the limitations period by virtue of the fact that he did not become aware that defendants' actions constituted violations of his constitutional rights

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[3] Defendants ask that the court take judicial notice of the Statement of Legislative Intent regarding the SVPA. The court may take judicial notice of public records. MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986). Accordingly, defendants' request will be granted.

until he arrived at Atascadero State Hospital (Atascadero) in early 2000. However, ignorance of the law is not a valid reason for tolling a statute of limitations. Garabedian v. Skochko, 232 Cal.App.3d 836 (1991). Accordingly, defendants should be granted summary judgment with respect to all claims asserted by plaintiff which accrued before December 29, 1999. This includes, but is not limited to plaintiff's claims concerning transportation to and from court proceedings as his SVP proceedings ended on December 13, 1999.

Defendants argue that they should be granted summary judgment on plaintiff's claims against defendant Blanas in his official capacity, and against the County, because Blanas, in his role as policymaker for the SCJ, acts on behalf of the State of California, not the County. Defendants point out that the State of California and its officers and officials are entitled to absolute immunity under the Eleventh Amendment. See Will v. Michigan Department of State Police, 491 U.S. 58 (1989). However, the United States Court of Appeals for the Ninth Circuit has recently found that sheriffs in California act for their counties when they are overseeing and managing local jails, not the State of California. Streit v. County of Los Angeles, 236 F.3d 552, 561 (9th Cir. 2001). Accordingly, Blanas is not entitled to Eleventh Amendment immunity and the County may be held liable for the actions of Blanas pursuant to Monnell v. Dept. of Social

Services of New York, 436 U.S. 658 (1978).[4]

With respect to the remainder of plaintiff's claims, the following facts are not disputed:

1. Plaintiff was declared a "Sexually Violent Predator" (SVP) on December 13, 1999 pursuant to California Welfare and Institutions Code § 6600 et seq., and admitted to Atascadero.

2. Prior to being declared a sexually violent predator, plaintiff was housed in the Sacramento County Jail.

3. Between December 9, 1998, and January 4, 2000 (when plaintiff was actually transferred to Atascadero) plaintiff lived in a housing unit at the Sacramento County Jail called "Total Separation" (T-Sep). In T-Sep, plaintiff was not permitted to have contact with any other inmates or detainees.

4. While in T-Sep, plaintiff had access to the day room for at least three hours of activity distributed over a period of seven days.

5. Plaintiff also had broad access to the attorney representing him in sexually violent predator proceedings while in T-Sep. Plaintiff has limited access to legal materials provided by the Sacramento County Jail.

6. Plaintiff did not have access to exercise programs or

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[4] Defendants ask that the court judicially notice two Eastern District orders concerning Eleventh Amendment immunity. The first was issued December 21, 1998 in Ackerman v. County of Nevada, CIV S-98-760 FCD DAD. The second was issued December 3, 2001 in Wiley v. County of Sacramento, CIV S-01-1548 FCD GGH. The court may take judicial notice of public records including its own files from other cases. MGIC, 803 F.2d at 504. Accordingly, defendants' request will be granted.

recreation programs while in T-Sep.

7. Plaintiff could not attend religious services while in T-Sep, but did have access to religious materials.

8. Plaintiff was strip-searched at gunpoint while in T-Sep.

9. Plaintiff's cell and person were routinely searched while plaintiff was in T-Sep. Sometimes, some of plaintiff personal items were confiscated.

10. Plaintiff was supervised by deputy sheriffs with no specific training in the handling of persons detained pursuant to the sexually violent predator act while in T-Sep.

11. Defendant Blanas is the final policymaker for the Sacramento County Jail.

12. While in T-Sep, plaintiff exchanged dirty undergarments for clean ones twice a week. Outer garments were exchanged once a week.

13. Plaintiff was allowed one hour of exercise every other day.

14. Plaintiff could not receive confidential correspondence.

15. Plaintiff received at least two one hour visits with friends and family.

16. Plaintiff could not place confidential phone calls while in T-Sep.

The facts concerning plaintiff's inability to attend religious services and his inability to participate in "law library activities" (Compl. at 10.) support plaintiff's First Amendment claims. However, plaintiff has failed to present evidence indicating a denial of his right to freely exercise his religion. Plaintiff indicates that he has been denied

access to religious services, but plaintiff has not explained how a general denial of access to religious services has denied him his ability to practice his own religion (assuming of course that plaintiff is religious). Also plaintiff has failed to present any evidence indicating that he has been injured in any way by his inability to participate in "law library activities," as he must do pursuant to Lewis v. Casey, 518 U.S. 343, 351 (1995). Accordingly, defendants' should be granted summary judgment on plaintiff's First Amendment claims.

Plaintiff claims that he has been denied due process in violation of the Fourteenth Amendment because, while at the Sacramento County Jail, he was not treated in conformance with § 5325 of the Lanterman-Petris-Short Act (LPSA) [Cal. Welf. & Inst. Code § 5000 et seq]. Plaintiff believes that under the LPSA he is entitled to confidential correspondence, the ability to make confidential phone calls, the ability to have visitors every day, and the right to not be charged exorbitant prices for commissary items. However, under California law, rights enumerated in § 5325 are to be afforded to:

> Each person involuntarily detained for evaluation or treatment under provisions of [the LPSA], each person admitted as a voluntary patient for psychiatric evaluation or treatment to any health facility, as defined in Section 1250 of the Health and Safety Code, in which psychiatric evaluation or treatment is offered, and each mentally retarded person committed to a state hospital pursuant to Article 5 (commencing with Section 6500) of Chapter 2 of Part 2 of Division 6.

Plaintiff was not detained pursuant to the LPSA, but rather the Sexually

Violent Predator Act. Accordingly, plaintiff has no due process right to provisions of the LPSA.

Plaintiff's also claims he has been denied equal protection of the laws because, as an SVPA detainee, he is not afforded the rights given to those identified in the LPSA.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents." Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923).

Plaintiff argues that as a sexually violent predator act detainee he was similarly situated to persons committed under the LPSA, because he and LPSA committees are both mentally ill. While this may be true, plaintiff was also initially detained under the sexually violent predator act because the possibility existed that plaintiff posed "a danger to the health and safety of others in that it is likely that [plaintiff] . . . will engage in sexually violent criminal behavior." Cal. Welf.& Inst. Code § 6600. Plaintiff has not presented any evidence indicating persons who are committed under the LPSA necessarily pose the same danger, or even any danger, to other persons. Plaintiff has not shown

that as a person detained pursuant to the sexually violent predator act he was similarly situated to persons committed under the LPSA. See Munoz v. Kolender, __F.Supp.__, 2002 WL 1343787 (S.D. Cal., June 14, 2002). Accordingly, defendants should be granted summary judgment on plaintiff's equal protection claim.

Plaintiff asserts that his Fourth Amendment rights were violated by virtue of the fact that he was strip-searched at gunpoint and because his cell and person were both searched regularly. If conducted for significant and legitimate security interests, strip searches and body cavity inspections of committed persons do not violate the Fourth Amendment. Bell v. Wolfish, 441 U.S. 520, 558-60 (1979). It is not clear from the documents submitted by the parties why plaintiff was strip searched. While an issue of fact exists as to whether the strip-search was justified, plaintiff has not presented anything indicating defendant Blanas was involved in the search in any way, nor that the search was conducted pursuant to a policy adopted by the County.[5] Defendants should accordingly be granted summary judgment on this claim. With respect to searches of plaintiff's cell and person, the United States Supreme Court has upheld the constitutionality of housing SVPs within prison facilities. See Seling v. Young, 531 U.S. 250, 261 (2001). Within a prison, Fourth Amendment rights are

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[5] For the County to be liable under 42 U.S.C. § 1983, plaintiff must show that he was injured pursuant to a municipal policy, practice or custom. Monell v. Dept. of Social Services of New York, 436 U.S. 658, 694 (1978).

understandably limited for security purposes. See Lanza v. New York, 370 U.S. 139 (1962). Cell searches and searches of one's person while in prison generally do not breach constitutional rights and plaintiff has not shown any specific reason to depart from that general rule.

Plaintiff complains that some of his personal items were taken without justification. But, plaintiff alleges nothing which suggests defendants were involved in the deprivation. Additionally, the United States Supreme Court has held that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984). Thus, where the state provides a meaningful postdeprivation remedy, only authorized, intentional deprivations constitute actionable violations of the Due Process Clause. An authorized deprivation is one carried out pursuant to established state procedures, regulations, or statutes. Piatt v. McDougall, 773 F.2d 1032, 1036 (9th Cir. 1985); see also Knudson v. City of Ellensburg, 832 F.2d 1142, 1149 (9th Cir. 1987).

In the instant case, plaintiff has not alleged any facts which suggest that the deprivation was authorized. The California Legislature has provided a remedy for tort claims against public officials in the California Government Code §§ 900, et seq. Since plaintiff has not attempted to seek redress in the state system, he cannot sue in federal court on the claim that the state deprived him of property without due

process of the law.

Plaintiff also asserts defendants' actions violated several provisions of the Constitution which are simply not applicable to the facts presented. These provisions include the Fifth Amendment, the Ninth Amendment and the Constitution's prohibition against ex post facto laws. At first glance it would appear that the Eighth Amendment is implicated by the facts alleged by plaintiff. However, the Eighth Amendment's proscription against cruel and unusual punishment applies only to convicted prisoners. Bell v. Wolfish, 441 U.S. 520, 535, n. 16 (1979).

The court will analyze the remainder of plaintiff's claims under the Due Process Clause of the Fourteenth Amendment.[6] To prevail on a substantive due process claim regarding conditions of confinement, plaintiff must establish facts sufficient to show that defendants' acts or omissions deprived the plaintiff of the "minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). This objective component is not satisfied so long as the defendants furnished plaintiff with adequate food, clothing, shelter, sanitation, medical care, and personal safety. Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982). There is also a subjective component necessary to establish liability for inadequate prison conditions under the Due Process Clause: the existence of an actionable deprivation, as to which

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[6] The standards for liability for unlawful conditions of confinement are the same under the Fourteenth and Eighth Amendments. Redman v. County of San Diego, 942 F.2d 1435, 1440-41 (9th Cir. 1991)

the defendant purportedly acted with "deliberate indifference." Wilson v. Seiter, 501 U.S. 294 (1991). "Deliberate indifference" exists when a prison official "knows of and disregards an excessive risk to inmate health and safety; the official must be both aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994).

Viewed in the light most favorable to him, plaintiff has identified no condition of confinement rising to the level of a constitutional violation.

The fact that Sacramento County Jail guards did not receive specific training on how to deal with persons with a mental illness does not, in and of itself, amount to a violation of plaintiff's constitutional rights. The same holds true for plaintiff's claims concerning the fact that he was shackled when transferred to Atascadero. Further, plaintiff has failed to present any additional facts which, when considered with the above, amount to a constitutional violation.

Plaintiff complains that he did not have access to exercise or recreational programs while at the Sacramento County Jail. Plaintiff has not established that he has a constitutional right to recreational programs, exercise programs or even state-provided recreational supplies (e.g. television, books, games, etc.).[7]

Plaintiff complains that sometimes the temperature in his cell

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[7] This is not to say plaintiff does not have a right to exercise or to recreate.

and the clothing provided to him were uncomfortable. Plaintiff has presented no evidence in support of either allegation. In any case, being intermittently exposed to uncomfortable conditions is not a deprivation which is objectively serious enough to implicate plaintiff's constitutional rights.

Plaintiff alleges he did not receive "regular" access to fresh air and sunlight. (Compl. at 15.) The term "regular" is vague and plaintiff has not presented any evidence indicating how much fresh air and sunlight he did (or did not) receive. Accordingly, plaintiff has not presented evidence showing that his constitutional rights have been violated.

Plaintiff alleges that receiving only one hour of exercise every other day was constitutionally inadequate. Plaintiff does not have a per se Constitutional right to more than one hour of exercise every other day and plaintiff has failed to present any evidence indicating that failure to receive more than that is sufficiently serious to rise to the level of a violation of his constitutional rights.

Based on the foregoing, defendants should be granted summary judgement on all of plaintiff's claims.

In accordance with the above, IT IS HEREBY ORDERED that:

1. Plaintiff's January 14, 2002 request for the court to delay ruling on defendants' December 14, 2001 motion for summary judgment is denied; and

2. Defendants' December 14, 2001 request for judicial notice is granted.

IT IS HEREBY RECOMMENDED that

1. Defendants' December 14, 2001 motion for summary judgment be granted;

2. Plaintiff's January 4, 2002 cross-motion for summary judgement be denied; and

3. This case be closed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S. C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within five days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: August 16, 2002.

/s/ JOHN F. MOULDS
UNITED STATES MAGISTRATE JUDGE